

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 85-489-RGS

UNITED STATES OF AMERICA

v.

METROPOLITAN DISTRICT COMMISSION, et al.

CIVIL ACTION NO. 83-1614-RGS

CONSERVATION LAW FOUNDATION  
OF NEW ENGLAND, INC.

v.

METROPOLITAN DISTRICT COMMISSION

SCHEDULE SEVEN COMPLIANCE ORDER NUMBER 248

January 3, 2021

STEARNS, D.J.

On December 21, 2020, the Massachusetts Water Resources Authority (MWRA) filed its Biannual Compliance and Progress Report (Report) (the 248<sup>th</sup> such report over the course of this now 36-year-old litigation). Dkt #1881. With the Report, the MWRA filed a copy of the Semiannual CSO (Combined Sewer Overflow) Discharge Report No. 5, January 1, 2020 – June 30, 2020, which issued on October 30, 2020. On December 29, 2020, the Conservation Law Foundation through Peter

Shelley, its Senior Counsel, filed a response. The United States has not since indicated that it intends to comment.

There were no scheduled activities during the past six-month period on the court's Schedule 7.

As has been noted previously, the MWRA, the United States Environmental Protection Agency (EPA), and the Massachusetts Department of Environmental Protection (DEP), entered an agreement (approved by the court at a July 19, 2019 hearing), extending the completion date of the performance assessment of the Long-Term Combined Sewer Overflow Control Plan (LTCP) to December 31, 2021.<sup>1</sup> One of the principal terms of the agreement required the MWRA to recalibrate the hydraulic assessment model used to test the performance of the LTCP. As the court observed in its July 16, 2020 Compliance Order, the results have both positive and mixed aspects. As the court explained:

On the positive side of the ledger, the Typical Year results show an 87% region-wide reduction in annual CSO discharge volume (as opposed to the modestly higher 88% envisioned in the LTCP). On the less positive side of the ledger, the assessment has identified regulators and outfalls where CSO activity exceeds the desired (previously predicted) levels. These include discharges

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<sup>1</sup> As part of the Agreement, the EPA and the DEP, acting pursuant to 40 C.F.R. § 131.14 and 314 CMR 4.03(4), respectively, granted the MWRA's request to extend existing water quality variances affecting the Lower Charles River/Charles River Basin and Alewife Brook/Upper Mystic River through 2024.

to the Fort Point Channel at Outfall BOS070 (which accepts CSO from the Dorchester Brook Conduit), as well as issues involving nozzle restrictions in the connections between BWSC CSO regulators and the MWRA's East Boston Branch Sewer, issues involving stormwater-influenced discharges from the City of Cambridge affecting the Cottage Farm Facility, and a leaking tide gate downstream of the Somerville Marginal Facility that has taxed the capacity of Outfall SOM007A/MWR205A on the Upper Mystic River Basin. Further mitigation efforts are also required by the variances granted for the Lower Charles River and the Alewife Brook/Upper Mystic River.

Schedule Seven Compliance Order [Dkt # 1878] at 2-3 (footnote omitted).

Nonetheless, as the court concluded, the process was ongoing, and the data as gathered was then too inconclusive to permit a fully informed evaluation. I cannot say that things are appreciably different now six months later.

Attorney Shelley's letter of December 29, 2020 makes essentially the same point, although I would stress (as does he) that a penultimate quest for perfection must not eclipse recognition of the positive and significant achievements reflected in the Biannual Report, notably the reduction since 1992 of untreated CSO flows into Boston Harbor by 95% and the reclaiming of Constitution Beach and Dorchester Bay as public recreational facilities.<sup>2</sup>

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<sup>2</sup> In an interesting side note, the MWRA reports that after ten years of operation the South Boston CSO Storage Tunnel continues to function to its expected capability of preventing CSO discharges affecting the Boston Harbor beaches in up to a 25-year storm. Report at 12.

I would also applaud as an enduring achievement the contribution that MWRA analysts and engineers have made to the science of water quality, particularly with respect to our understanding of CSO management and the engineering techniques that its remediation requires.

So where do things stand? Drilling down to the essentials, the recalibrated hydraulic model has delivered the desired data with respect to outfall performance, enabling the MWRA to identify 30 of 46 discharge locations where volume and activation goals have been or will be materially achieved by December 31, 2021. The remaining 16 outfalls, as the MWRA candidly acknowledges, are unlikely to achieve the desired goals despite ongoing efforts at mitigation.<sup>3</sup> Of concern, as noted by the CLF, as well as by the court in its last Order, are strategic outfalls impacting the Inner Harbor, the Fort Point Channel, the Charles River, and the Alewife Brook/Upper Mystic River.

The issue to be addressed by the court and the parties, as iterated by the MWRA from its prior Report, is “whether further investments in CSO mitigation will result in meaningful water quality improvements, or whether emphasizing non-CSO contributions of pollution would be more cost

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<sup>3</sup> These efforts are summarized at pages 5 to 8 of the Report and, as the MWRA notes, some of the projects now underway will produce benefits in the reduction of CSO levels in years well after December of 2021.

effective and impactful to water quality.” Report at 8. The CLF, in its Letter Comment, frames the issue in terms focused on the underperforming outfalls, recommending “that concrete remedial actions [be] identified by the MWRA to the Court with an associated timetable with respect to any outfalls that were not able to achieve the final LTCP objectives.” Letter Comment [Dkt # 1882] at 2.

With respect to water quality standards and the development and calibration of receiving water quality models for the CSO variance waters – the Lower Charles River/Charles Basin and the Alewife Brook/Upper Mystic River – the MWRA reports continued progress. After significant coordination with the affected CSO communities and the BWSC, the MWRA’s consultant has begun the necessary water quality assessments with deliverable results expected in February of 2021.<sup>4</sup> As the MWRA notes, this water quality information will be useful in answering the question of the future course to be taken with respect to the underperforming outfalls insofar as their impact on the variance waters is concerned.<sup>5</sup>

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<sup>4</sup> These “variance” waters are designated Class B under the Massachusetts Surface Water Quality Standards and as such are permitted to accept a limited amount of CSO discharge (presently through August of 2024). Report at 8.

<sup>5</sup> The MWRA reports full and continuing compliance with the variance conditions set by the DEP and approved by EPA Region 1, including receiving

ORDER

As the issues raised in this Report make clear, the court and the parties face several important decisions prior to the submission of the performance assessment report on December 31, 2021, the final CSO milestone. The court is inclined to believe that a status conference at the beginning of March, after more data has been gathered, would be useful and seeks the parties' advice in that regard. Consistent with the court's revised Scheduling Order, the MWRA will submit Compliance Report No. 249 on or before June 25, 2021, or on such other date as the court may specify.

SO ORDERED.

/s/ Richard G. Stearns  
UNITED STATES DISTRICT JUDGE

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water quality sampling and modeling, public notification of CSO discharges, performance assessments, and mitigation evaluations, including those of the rehabilitated Alewife Brook Pumping Station and the CSO outfalls along Alewife Brook, and the Charles and Mystic Rivers.